

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
Plaintiff, :
v. : 12 Civ. 2826 (DLC)
APPLE INC., *et al.*, :
Defendants. :
-----x

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THE STATE OF TEXAS, :
THE STATE OF CONNECTICUT, *et al.*, :
Plaintiffs, :
v. : 12 Civ. 3394 (DLC)
PENGUIN GROUP (USA) INC., *et al.*, :
Defendants. :
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APPLE INC.'S POST-TRIAL MEMORANDUM

Part 1 of 8



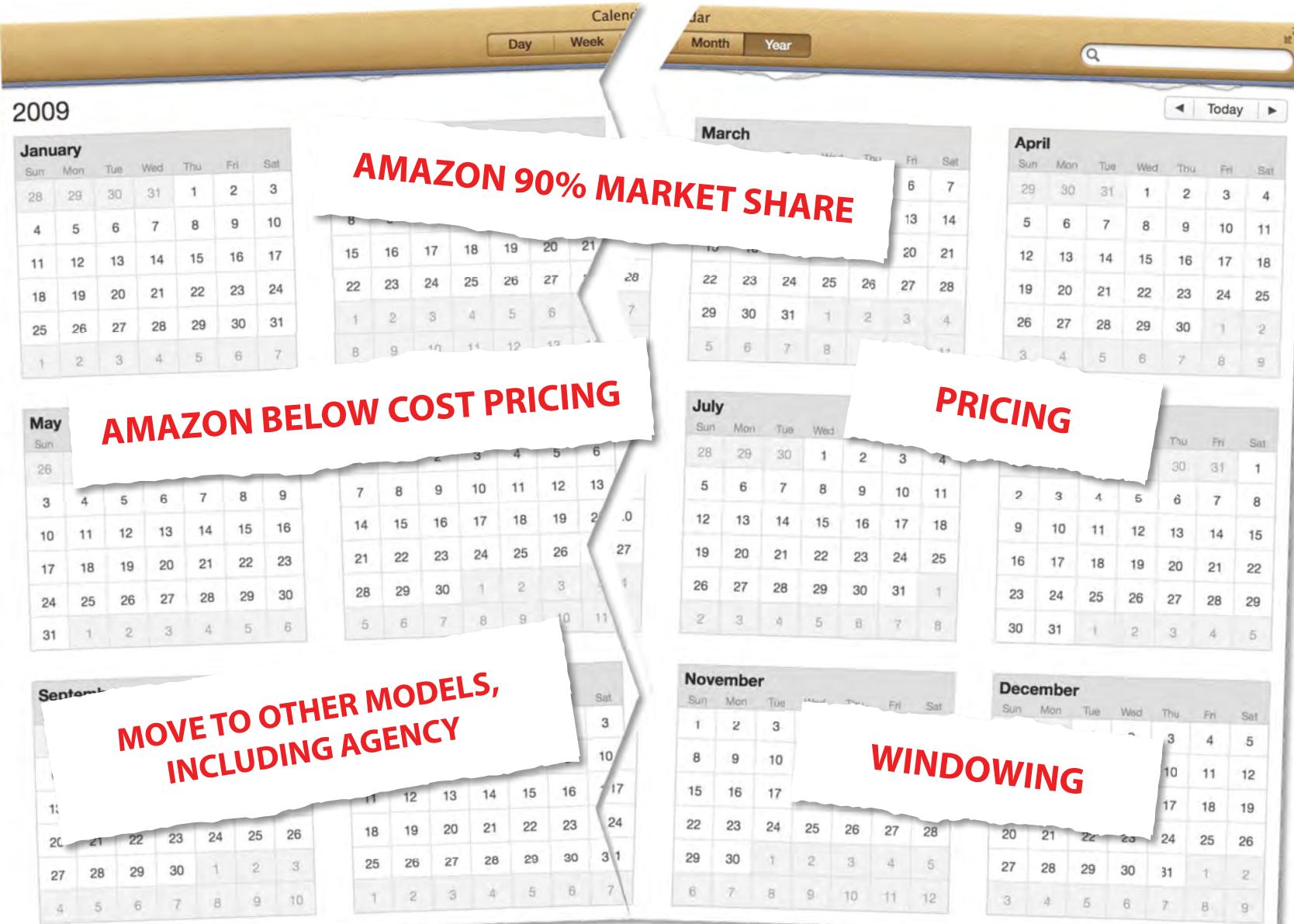
Summation

2008 – 2009

2009 eBook Market Turmoil

Calendar																	
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2009 eBook Market Turmoil



Windowing



SEP 2009: Hachette announces plan to window Ted Kennedy's *True Compass* (Young Decl. ¶19); in December 2009 announces plan to window "vast majority of its titles." (DX-061)



SEP 2009: HarperCollins windows Sarah Palin's *Going Rogue* (PX-0416; PX-026); in December 2009 announces plan to window 5-10 titles per month. (DX-072)



NOV/DEC 2009: Simon & Schuster windows Stephen King's *Under the Dome* through the holidays and announces plan to window 35 new books from January to April 2010. (Reidy Decl. ¶¶14-15)



DEC 2009: Macmillan announces plan to window "most" of its eBooks beginning in January. (Sargent Decl. ¶19)



DEC 2009: Penguin CEO states that they "may undertake trial pricing and defer publication from time to time...." (DX-72)

Publishers Delay E-Book Releases

Publishers have been debating the timing of e-books in part as a way to protest the low prices - typically \$9.99 - that online retailers like Amazon and Sony are offering on e-book versions of new releases and best sellers.

DECEMBER 9, 2009 *New York Times*

HarperCollins Joins Ranks Of Those Delaying E-Books

The third major publishing house in two days has decided to delay the electronic-book publication of some titles next year, as the debate over the timing and pricing of e-books heats up.

...

Mr. Murray said that if new hardcover titles continue to be sold as \$9.99 e-books, the eventual outcome will be fewer literary choices for customers, because publishers won't be able to take as many chances on new writers.

December 10, 2009 *Wall Street Journal*

DX-23: April 2, 2009 Email From Bezos To Porco, et al.

From: Freed, Ian
Sent: Wednesday, June 03, 2009 7:23 PM
To: Nagar, David
Subject: FW: Kindle meeting with Markus Dohle, CEO Random House

FYI. Some old mail that is helpful for context.

From: Bezos, Jeff

On delaying the ebook -- that would be an absolute declaration of war

On delaying the ebook -- that would be an absolute declaration of war -- terrible customer experience -- very embarrassing to us in front of customers -- the simple fact is we couldn't tolerate it -- it would be better to just not carry their books. You have to nip that idea in the bud before he can even finish the sentence. I would pre-empt that conversation early in the meeting by showing charts and graphs about how we need to get more of their books available for kindle pre-order. Talk a lot about how that is our biggest most important initiative in the coming year.

- January Kindle COGS: \$ [REDACTED]
- Feb Kindle COGS: \$ [REDACTED]
- March Kindle COGS through 3/30: \$ [REDACTED]
- T90 Kindle Sales Units: [REDACTED]
- T90 Physical Sales Units: [REDACTED]
- Kindle units of total Physical Books at Amazon: [REDACTED]
- Kindle sales ratio of Physical Books with a Kindle edition: [REDACTED]

We believe there are still significant areas of opportunity for Random House to increase sales and capture MSS for their authors.

- [REDACTED] of their DWC is available on Kindle [REDACTED] Kindle books)
- Their biggest immediate opportunity is in [REDACTED] titles which account for [REDACTED] of their unapproved available DWC (if all of this was approved, it would [REDACTED]).

1 USA v. Apple Inc., et al.
12-CV-02826-DLC
DX-023

AMZN-MDL-0036927
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DX-28: June 29, 2009 Email From Naggar To Kessel, et al.

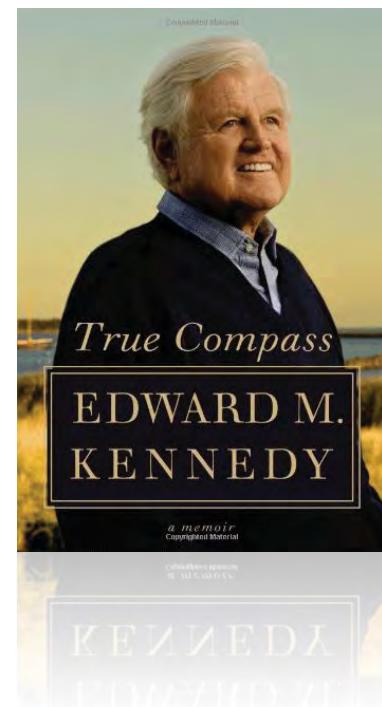
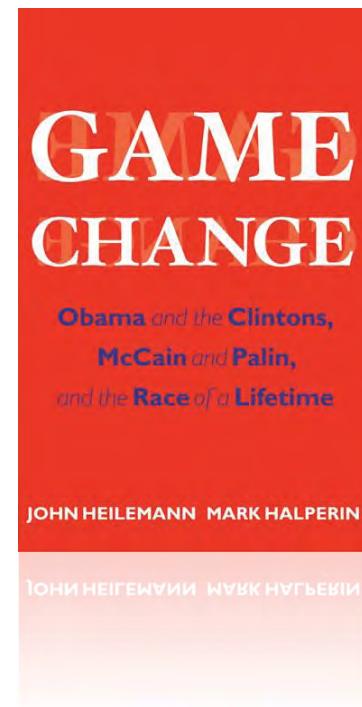
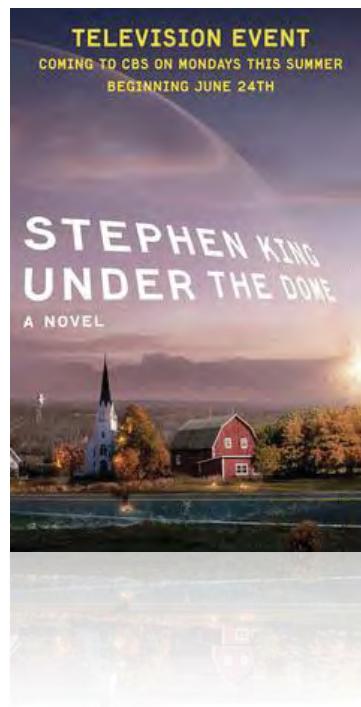
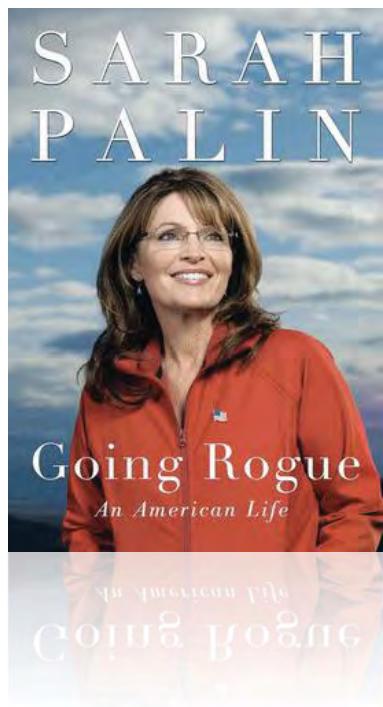
The nuclear nature of windowing, even on a single title
force us to a very negative response

- I made it very clear to them the nuclear nature of windowing, even on a single title, and that such an action would scuttle this process and force us to a very negative response and that this was something we needed to stay away from.

- **Pool for advances:** least attractive option due to exclusivity despite the potentially significant dollars.
- **Incentive for pre-publication on Kindle:** they are very interested in doing books with enhanced features, and he considers early release titles to be in that category. He also said that they were looking at TTS enabling as an "enhanced feature that could justify a higher price. I disagreed, explaining that for the vast majority of titles and publishers, this was simply a feature on the device. We needed to talk about the dramatically recorded audiobook to make this interesting.
- **COGS guarantee:** Very intrigued (I put [REDACTED] to [REDACTED] on the table as our back of the envelope calc). Both seemed surprised that we weren't asking for more than lower DLP, release date parity, and raised DWC.
 - I made it very clear to them the nuclear nature of windowing, even on a single title, and that such an action would scuttle this process and force us to a very negative response and that this was something we needed to stay away from.
 - They are looking to experiment with pricing to understand elasticity and are wondering if we can help.

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DX-028

AMZN-MDL-0160724
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Testimony Of Eddy Cue

Q. If windowing was such a big concern for Apple, when it was considering entering the eBook space, how come Apple never undertook to determine how many books were actually being windowed?

A. Because the number doesn't matter. What matters is which books. So 37 could be a huge number if it's the right books.



Testimony Of Russell Grandinetti

Q. And that was because the industry, at the time, was debating a lot of issues and Amazon wanted agents and authors to have its perspective, correct?

A. Yes, sir.

Q. Now, would you agree with me, then, that throughout 2009, there was considerable unrest in the eBook industry?

A. Yes.

DX-55: On December 3, 2009 Barnes & Noble Made A Decision To Go To Agency

From: William J. Lynch
Sent: Thursday, December 03, 2009 3:11:07 PM
To: B&N.com Leadership; Theresa Homer; Victoria Repice; Douglas Gottlieb; Chris Peifer
Subject: Our Content Strategy

We discussed at length the importance of building one of the world's most formidable digital content catalogs...that is SALEABLE. Increasingly, publishers (large and small) are reticent to just post their wares on the web where the only entity making money monetizing that content in any real way is Google. So building a robust repository of digital content, where consumers can easily search and find books, magazines, newsletters, etc — and where a publisher can easily upload their content and establish a monetizable business relationship with B&N in a

We need to enable this agency model through our content store and [the publishers] will happily join.

In summary, strategically it's important for us to build a robust click-and-go publishing platform that offers an "agency" T&C agreement to publishers. The things we should solve for as we design the system include:

a platform that clearly outlines our requirements on supported formats (ePub, PDF, etc)
is administratively as turn-key as possible for the publishers to get their content loaded
contains a streamlined click-through agreement that encourages an agency relationship where the publisher sets the price
supports easy financial reconciliation as we scale the number of pubs we deal with

I'm sure there are other requirements I've missed.

Let's discuss at the next Exec Staff to capture thoughts and assess when we could launch something.

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DX-055

EXHIBIT 54
Gilbert 5
1-16-13

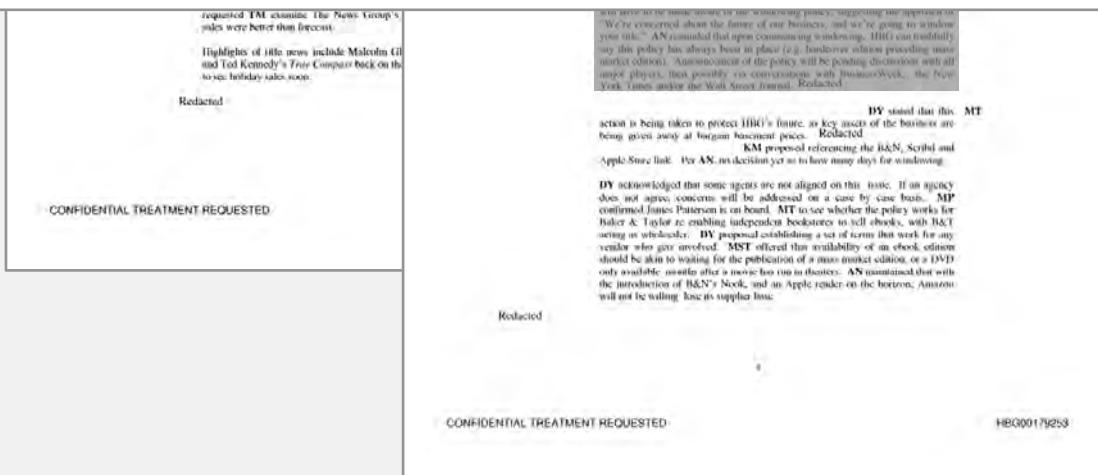
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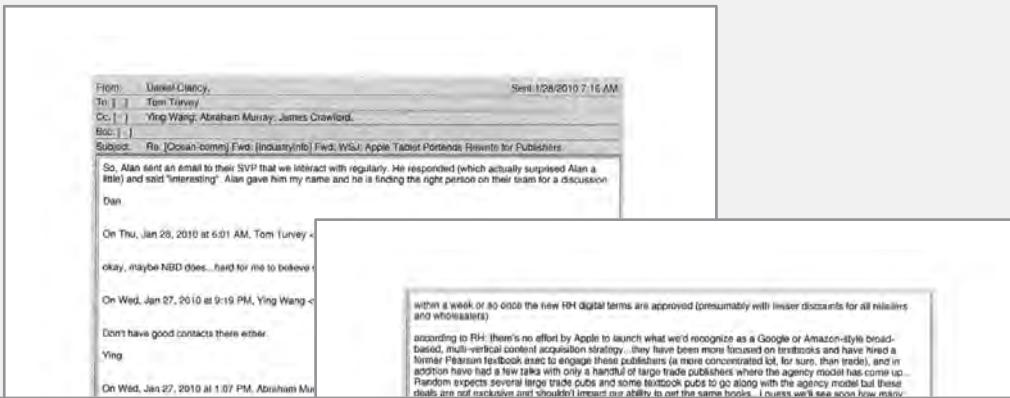
PX-417: On Dec. 4, 2009 Hachette Board Votes To Window And Adopt "B&N Model"



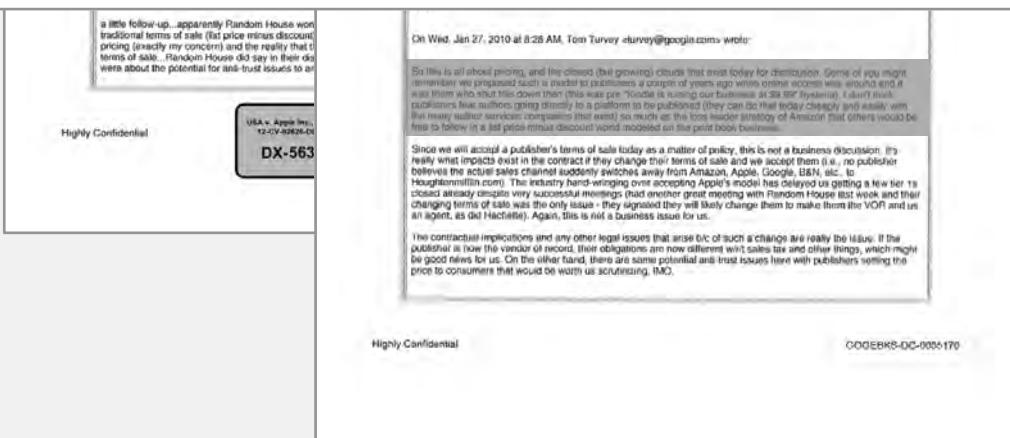
DY distributed a list of 24 possible titles for windowing (January – June, 25k+ printorder, \$27.99+) and proposed a two-stage program: 1) make clear these titles will be windowed, and 2) if we move to the B&N model scenario windowing will be removed.



DX-563: January 27, 2010 Email From Turvey To Murray



So this is all about pricing, and the closed (but growing) clouds that exist today for distribution. Some of you might remember we proposed such a model to publishers a couple of years ago when online access was around and it was them who shut this down then (this was pre "Kindle is ruining our business at \$9.99" hysteria). I don't think publishers fear authors going directly to a platform to be published (they can do that today cheaply and easily with the many author services companies that exist) so much as the loss leader strategy of Amazon that others would be free to follow in a list price minus discount world modeled on the print book business.





Testimony Of David Naggar

Q. And you meant by that that the eBook industry was at a crossroad, correct?

A. Yes.

Q. And on the verge of substantial change, right?

A. In the middle of.

Q. In the middle of?

A. Yes.

Turmoil in eBook market over \$9.99 pricing

Windowed eBooks and threats to increase windowing

Publishers and retailers seek new business model

Agency model already being embraced

December 9 – 16, 2009